(14)

No. 08-1065

IN THE
SUPREME COURT OF THE UNITED STATES

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL, AND DAVID RICHTER,

*Petitioners,*

v.

TERRY J. HARRINGTON AND CURTIS W. MCGHEE, JR.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

# BRIEF OF BLACK COPS AGAINST POLICE BRUTALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

The issue in this case is whether, in an action brought under 42 U.S.C. § 1983, prosecutors who fabricated and concealed evidence during an investigation of plaintiffs they knew to be innocent, have absolute, rather than qualified, immunity because they later represented the state in formal proceedings in which the plaintiffs were unjustly convicted and at which the fabricated evidence was introduced.

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## INTEREST OF AMICUS CURIAE

Black Cops Against Police Brutality (BCAP) is an organization dedicated to ensuring that the rights of all citizens are not abridged by the police, especially in urban America, and to ensuring that people of color are afforded equal rights under the Constitution. BCAP's website is *available online at* http://www.b-cap.org/. BCAP takes a particular interest in opposing racial profiling and police use of excessive force, especially against persons of color, and is more generally concerned with any racial unfairness in the administration of justice.[1] The parties have consented to the filing of this Brief.

## STATEMENT OF THE CASE

The facts are set out in detail in the District Court's opinion below. *McGhee v. Pottawattamie Cty., IA,* 475 F. Supp. 2d 862 (S.D. Iowa 2007). Given the procedural posture of the case, *see id.* at 867 n.1 & 878-80, our summary here will assume the truth of the allegations. As pertinent here, Terry Harrington and Curtis McGhee brought suit against prosecutors and police officers who fabricated, coerced, and concealed evidence to frame them for the murder of John Schweer. Schweer, a recently retired police captain employed by three car dealerships as a security guard, was killed by a shotgun blast in the early morning hours of July 22, 1977. *Id.* at 868. The

[1] No counsel for any party has authored this Brief in whole or in part and no person or entity, other than amicus curiae, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of the Brief.

complaints include counts brought under 42 U.S.C. § 1983 as well as other claims. Among the defendants were David Richter, then county attorney with jurisdiction over the murder, and Joseph Hrvol, an assistant state's attorney directly involved in the investigation into Schweer's murder.

In 1978, respondents Terry Harrington and Curtis McGhee were convicted of the murder, after separate trials, each receiving a sentence of life imprisonment without parole. *Id.* at 874. These convictions were upheld on appeal. In 1999, exculpatory evidence surfaced in the form of police reports strongly suggesting the guilt of another suspect. *Id.* This evidence had been withheld illegally, and, based on the *Brady* violations, the Iowa Supreme Court reversed Harrington's conviction. *Id.* The state at first attempted to retry Harrington, but gave up the effort in 2003 after the star prosecution witness, Kevin Hughes, a/k/a Kevin Mack, an alleged accomplice turned state's witness, recanted his former testimony. *Id.* at 875. McGhee agreed to enter an *Alford* plea in exchange for a sentence of time served. *Id.* at 876-77. Thus, both respondents in this case served twenty-five years in prison.

Defendants, individually and collectively, fabricated evidence against plaintiffs and concealed exculpatory evidence. In particular, plaintiffs claim that defendants suborned the perjury of Hughes by threats, going so far as to coach his perjury by altering details to fit incontrovertible facts. *Id.* at 870. The complaints also paint a broader picture of

deliberate prosecutorial misconduct, summarized by the District Court as follows:

> In essence, each of the asserted claims allege that the prosecutors Hrvol, Richter, and Wilber improperly concealed exculpatory evidence; concealed the alleged coercion of witnesses; participated in court proceedings; coerced witnesses; participated in the Schweer murder investigation; and conspired with the respective police defendants to commit the alleged misdeeds against the Plaintiffs.

*Id.* at 880-81.

Defendants Richter and Hrvol, petitioners here, sought summary judgment based on the absolute prosecutorial immunity recognized in *Imbler v. Pachtman,* 424 U.S. 409 (1976). Applying the functional test of *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993), the district court granted the motion with respect to *Brady* violations by the prosecutors after the filing of the True Information on February 17, 1978, even though, given defendants' knowledge that the case against McGhee and Harrington was a web of falsehoods, reasonable jurors might still have found probable cause to be lacking. 475 F. Supp. 2d at 892. The court denied the motion with respect to prosecutorial misconduct before the filing of the True Information, *id.* at 893-94, including liability for conspiracy under 42 U.S.C. § 1985, *id.* at 898. Thus, defendants Richter and Hrvol had only qualified immunity with respect to claims based on Richter's supervision of the investigation, and in Hrvol's

pervasive participation therein, including personally badgering Hughes into perjury and tailoring the story to be told at trial. *Id.* at 894-95 ("Because Defendants have fundamentally admitted that they coached and coerced witnesses and fabricated evidence, the prosecutors have utterly failed to carry their burden to show that such acts were 'intimately associated with the judicial process' such that they are entitled to absolute immunity."). The court then rejected defendants' motion based on qualified immunity, finding that fabricating evidence violated plaintiffs' due process rights in violation of clearly established law. *See id.* at 903-10.

Defendants Richter and Hrvol took an interlocutory appeal from the partial denial of their summary judgment motion. Relying on the Seventh Circuit's decision on remand in *Buckley, see Buckley v. Fitzsimmons,* 20 F.3d 789 (7th Cir. 1994), they argued that fabrication of evidence as such does not violate the targets' constitutional rights, and that use of the evidence at trial is protected by absolute immunity under *Imbler.* The Eighth Circuit Court of Appeals unanimously and tersely rejected any argument for either absolute or qualified immunity for the fabrication of evidence, relying on *Wilson v. Lawrence Cty.,* 260 F.3d 946 (8th Cir. 2001), and *Zahrey v. Coffey,* 221 F.3d 342 (2d Cir. 2000). Petitioners sought review of that ruling. This Court granted certiorari. *Pottawattamie Cty., IA v. McGhee*, 129 S. Ct. 2002 (2009).

## SUMMARY OF ARGUMENT

This case is not just about drawing a good lawyerly line between precedents. Petitioners' admitted conduct recalls law enforcement abuses from the Jim Crow South. The facts are that Terry Harrington and Curtis McGhee are black and once were young, and that John Schweer was white and had been a police captain. Together, these facts made it easy for petitioners and their accomplices to frame Harrington and McGhee for murder. Protecting that odious conduct under the shield of absolute immunity would add to the temptation of prosecutors investigating crimes that have outraged the community, and deny innocent victims compensation for terrible wrongs.

Fabricating evidence with intent to convict the innocent violates due process at the time of the fabrication. Using at trial evidence known to be false violates due process even when the trial prosecutor was not personally involved in the fabrication. The proposition that combining violations of the Constitution insulates the wrongdoers from liability is illogical and repugnant.

Absolute immunity is not required to ensure energetic law enforcement or to prevent a flood of frivolous lawsuits. Ubiquitous indemnification arrangements make the specter of personal liability spectral indeed. Qualified immunity has not chilled courageous action by police officers, who must make split-second life-and-death decisions without the luxury of time and without the prosecutor's

professional expertise. Frivolous suits are rare, and could be made rarer by Congress should they be seen to increase in response to a ruling holding prosecutors accountable for framing the innocent. In any event, when police and prosecutors engage in the same investigative work, it would be illogical and unfair to hold officers of the court to a lower standard.

We can imagine few rulings of this Court that would send a more negative message about American criminal justice than to permit white prosecutors to frame African-American suspects for the murder of a white police officer, admit the outrage, and then walk away with impunity, after their victims have wrongfully suffered twenty-five years in prison.

## ARGUMENT

### I. The Court Should Take Into Account Our Country's History Of Racial Discrimination, And Of False Convictions, When Deciding The Scope Of Prosecutorial Immunity

The standard recipe for a miscarriage of justice combines community outrage over an especially hateful offense with an official investigation focused on a black suspect. This Court has seen this combination before. In *Powell v. Alabama,* 287 U.S. 45 (1932)—the infamous case of the "Scottsboro boys"—the Court reversed the convictions of nine black youths accused of raping two white women. The judgment of history is that the accusation was false. *See* Michael J. Klarman, *The Racial Origins of*

*Modern Criminal Procedure,* 99 Mich. L. Rev. 48, 79 (2000).

In other cases from this period, however, the conduct of the "investigations" and "trials" was so wholly unconcerned with truth that it is difficult to say whether the authorities framed the innocent or chose, by chance, targets who happened to be guilty. In *Moore v. Dempsey,* 261 U.S. 86 (1923), the Court, per Justice Holmes, granted federal habeas petitions brought by black prisoners sentenced to death for murders allegedly committed during the Elaine, Arkansas race riot of October 1919. *See generally* Jeanie M. Whayne, *Low Villains and Wickedness in High Places: Race and Class in the Elaine Riots,* 58 Ark. Hist. Q. 285 (1999); Grif Stockley, Blood in Their Eyes: The Elaine Race Massacres of 1919 (2001). In *Brown v. Mississippi,* 297 U.S. 278 (1936), a unanimous Court, per Chief Justice Hughes, reversed the murder convictions of blacks accused of murdering a white farmer. *See generally* Richard C. Cortner, A "Scottsboro" Case in Mississippi: The Supreme Court and *Brown v. Mississippi* (1986). Confessions obtained by physical torture provided the only evidence against them at trial. *See Brown,* 297 U.S. at 281-84.

These landmark cases had much in common. In each, blacks were accused of heinous crimes against white victims. In *Moore,* the supposed murders took place during an outbreak of mass violence by whites against blacks. White citizens suspected black members of a farmers' union to be planning an insurrection. On September 30, 1919,

A.W. Adkins, a white railroad detective, and Charles Pratt, a white deputy sheriff, confronted members of the union outside a meeting held at a local church. The identity of the man firing the first shot is not known, but shots were fired. Adkins was killed and Pratt was wounded. *See* Whayne, *supra,* at 286-87. The killings provoked massive retaliatory violence. Twenty-five blacks and five whites are thought to have died in the bloodshed. *Id.*

Once the military restored order (after, by some accounts, participating in the race riot), hundreds of blacks were arrested and 79 indicted, twelve for murder. No whites were charged. The trials, conducted in a mob atmosphere, were show trials at which witnesses, coerced by threats including torture, gave implausible testimony that counsel for the defense accepted quiescently. *See Moore,* 261 U.S. at 89-90; Stockley, *supra,* at 106-37; Randall Kennedy, Race, Crime, and the Law 96-97 (1997).

In the Scottsboro case, white and black teens got into a fracas while hopping an open gravel car on a freight train. *See* James E. Goodman, Stories of Scottsboro 3-5 (1994) (summarizing the facts). The white kids lost the fight and were thrown off the train by the black kids. Two white women, Victoria Price and Ruby Bates, remained on the train with the blacks. The white youths reported the incident to a railroad agent who telegraphed to law enforcement officers down the line. These officers arrested the black youths on assault charges at the Paint Rock, Arkansas station. When deputies saw Price and

Bates get off the train, the women accused the blacks of rape.

Again a hostile mob surrounded the courthouse. The trial court appointed counsel only on the day of trial. Trial was again perfunctory, the all-white jury hanging in only one of the cases. On account of one defendant's youth (thirteen), one juror held out for life imprisonment rather than the death penalty. The Supreme Court reversed the convictions. Although the Court centered attention on the denial of counsel, the decision rested on the Due Process Clause, and the overall unfairness of the proceedings figured prominently in the Court's reasoning.

*Brown* arose from the murder of a white planter named Raymond Stewart. Officers led by Deputy Cliff Dial, acting without probable cause, seized a black man named Arthur Ellington from his home, strung him up from a tree and whipped him. Ellington refused to confess. The next day, the officers rearrested Ellington, and also took into custody Henry Shields and Ed Brown, both also black, for the murder. The prisoners were flogged with a leather strap having a metal buckle. "[A]s the whippings progressed and were repeated, [the prisoners] changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers." 297 U.S. at 282.

Before the indictment, the trial court conducted a preliminary examination of the suspects. The prisoners repeated their confessions in open

court and disclaimed any improper pressures. The trial judge ruled the confessions admissible, although Ellington's neck still showed the mark of the rope. 297 U.S. at 281, 283. Indictment and trial followed immediately, owing to fears of mob action. The trial was again conducted amid tense fears of mob violence; machine guns were thought necessary to secure the courthouse. *See* Cortner, *supra*, at 10. The defendants took the stand and disavowed their confessions as coerced by torture, and the state called the deputies in rebuttal. The deputies freely admitted whipping the defendants. 297 U.S. at 284-85. The jury nonetheless convicted. The state Supreme Court rejected the motion for a new trial, reasoning that the defense had failed to renew the objection to the confessions after the trial evidence showed coercion. *See Brown v. Mississippi*, 158 So. 339, 342 (Miss. 1935). The Supreme Court, per Chief Justice Hughes, unanimously reversed on due process grounds. 297 U.S. at 287.

The state proceedings in *Moore*, *Powell* and *Brown* were trials in form but lynchings in function. *See* Klarman, *supra*, at 57 ("the state-imposed death penalty in these cases was little more than a formalization of the lynching process"). In all these cases, the public prosecutor had the choice to proceed or not. The choice was less easy than hindsight might make it, because honest legal proceedings might have driven the mob to a bloody frenzy. Nonetheless, the prosecutors might have cooperated in some plan to delay and remove the proceedings, or, if necessary to avoid complicity, resign their posts.

Each, instead, chose to proceed in violation of the Constitution.

In the Elaine cases, John Elvis Miller served as prosecuting attorney for the First Judicial Circuit of Arkansas. *See* John Elvis Miller Papers (Miller Papers), *available online at* http://libinfo.uark.edu/SpecialCollections/findingaids/jemilleraid.html (last visited Sept. 10, 2009). After obtaining capital convictions against impoverished blacks, based on coerced evidence, at "trials" dominated by a hostile mob, Miller went on to serve, first as judge, then as United States Senator. *See* Miller Papers, *supra*.

Jackson County Solicitor H.G. Bailey conducted the prosecution of the Scottsboro defendants. *See* Robert F. Martin, *The Scottsboro Cases,* in Historic U.S. Court Cases: An Encyclopedia 637, 638-39 (John W. Johnson ed., 2d ed. 2001). Bailey, so far as we can tell, vanished from the view of history after the Scottsboro cases.

District Attorney John C. Stennis prosecuted Ellington, Brown, and Shields. *See* Cortner, *supra*, at 15. Stennis, like everyone else in the court who saw the rope marks on the neck of Ellington and heard the deputies testify to the flogging, was clearly aware of both the torture and the absence of any other evidence against the defendants. Like Miller, however, having won death sentences based on torture, Stennis left the prosecutor's job to become a judge. *See* Biographical Sketch of John C. Stennis, *available online at* http://library.msstate.edu/cprc/

stennis/bio.asp (last visited Sept. 9, 2009). Like Miller, he was eventually made a Senator. *See* Kennedy, *supra,* at 106 note † ("John Stennis . . . paid no professional or political price for his part in the wrongful prosecutions of the defendants in *Brown*") (citations omitted). The United States Navy gave Stennis the honor of namesake for a *Nimitz* class carrier.

Lynch mobs are a thing of the past in this country, but the Court still sees cases of dubious charges pressed against black defendants charged with crimes that have excited community outrage. In *Olden v. Kentucky,* 488 U.S. 227 (1988), the jury convicted black men of raping a white woman based on remarkably weak evidence. In *Arizona v. Youngblood,* 488 U.S. 51 (1988), a black man convicted of sexually assaulting a ten-year-old boy claimed that the spoliation of potentially conclusive exculpatory evidence called for reversing his conviction. The Court rebuffed the claim. Subsequent, more sophisticated, DNA testing established Youngblood's innocence. *See, e.g.,* Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood: *Due Process, Lost Evidence, and the Limits of Bad Faith,* 86 Wash. U. L. Rev. 241 (2008). In *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Court reversed the conviction of a black defendant charged with murdering a white police officer because the local evidence law prevented the accused from proving three separate confessions made by another black suspect. The events alleged in the complaint here follow the script even more closely

than in *Chambers,* because here, the likely culprit, neglected by the police, was white.

Broader statistics reinforce the persistence of this sad pattern. According to the Innocence Project, among those convicted and later exonerated by DNA evidence, blacks outnumber whites by more than two to one. *See http://www.innocenceproject.org/Content/351.php* (last visited Sept. 2, 2009). In a study of 62 exonerations, Dwyer *et al.* found that 57% of the exonerated were black, and 69% of the victims were white. *See* Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence, app. 2 at 267 (2000). Dwyer *et al.* also found that prosecutorial misconduct was a factor in 26 of the 62 cases in their sample, making it more frequent than "defective or fraudulent science," "bad lawyering," "informants/snitches" and "false confessions." Dwyer *et al.*, *supra*, at 263. In a leading study of DNA exonerations, one reform proposed by Huff *et al.* is to subject the fabrication and concealment of evidence, by prosecutors as well as police, to effective civil remedies. C. Ronald Huff, Arye Rattner & Edward Sagarin, Convicted But Innocent: Wrongful Conviction and Public Policy 152 (1996).

Even today, falsely accused black defendants face major obstacles to vindication at trial. Given the negative correlation between African-American race and wealth, the innocent black defendant is more likely than the innocent white defendant to rely on publicly-provided defense representation. Enormous caseload pressures, often amounting to several

hundred felony cases per year per lawyer, hamper the effectiveness even of the many excellent and dedicated public defenders. *See, e.g.,* Stephen N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads,* 33 Champion 22, 23 n.35 (2009). Some indigent-defense lawyers, moreover, fall well below the standard set by the best. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003).

Even with perfectly fair selection procedures, African-Americans are likely to remain in the minority on juries. Empirical research indicates that white jurors are more ready to convict black defendants than to convict white defendants. *See, e.g.*, Sheri Lynn Johnson, *Black Innocence and the White Jury,* 83 Mich. L. Rev. 1611, 1626 (1985) (summarizing conclusions of nine studies, all of which found that white jurors were "more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty"); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions,* 92 Mich. L. Rev. 63, 75-86 (1993) (reviewing studies).

We do not suggest qualified immunity for prosecutors during the investigation as a special rule limited to cases of blacks under suspicion for crimes that have outraged the community. We do stress that there *are* such cases, and they provide a very good reason for holding prosecutors generally accountable for deliberate wrongdoing during preliminary investigation. In these cases, the usual

checks on false convictions—a vigorous defense and a skeptical jury—are likely to be less robust than in other cases. It is vital that prosecutors, who can stop the train of events heading toward a miscarriage of justice before the train leaves the station, resist the inevitable pressure to declare a notorious case cleared by the arrest of the perpetrators.

The truly malicious prosecutor motivated to clear a notorious case has a rational incentive to frame the most vulnerable victim, the suspect with the least chance of vindicating his innocence and exposing the fraud. Petitioners deliberately framed victims who were black, young, and poor. Other defendants, such as those in the Duke lacrosse case, might have had the means to mount a gold-plated defense, and been able to count on a jury more open to the possibility of innocence. *Ex post* liability is necessary to deter prosecutorial misconduct that frames victims too vulnerable to have much chance of fighting back at trial.

This case is a throwback to the era of *Moore, Powell,* and *Brown.* There was no mob and there was no torture. Nonetheless, petitioners framed black youths they knew to be innocent for the murder of a white man who had served as a police captain until shortly before the crime.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice." *Rose v. Mitchell,* 443 U.S. 545, 555 (1979). Disparate enforcement of criminal sanctions "destroys the appearance of justice

and thereby casts doubt on the integrity of the judicial process." *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (quoting *Rose*, 443 U.S. at 555-56). "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). It would be hard to conceive of a more corrosive message about American criminal justice than would be sent by permitting white prosecutors to walk away from colorable allegations that they convicted innocent black youths, not by good-faith error, but by a deliberate and knowing design to pass off counterfeit justice.

## II. Qualified, Rather Than Absolute, Immunity Provides Adequate Protection For Prosecutors During Pretrial Investigations

### A. Qualified Immunity For Prosecutors During Pretrial Investigation Squares With The Understanding Of Congress In 1871

Congress adopted Section 1983 as a response to racist terrorism in the Reconstruction South. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 276 (1985) ("The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."); Eric Foner, Reconstruction: America's

Unfinished Revolution 1863-1877, at 454-59 (1988). The authorization of civil suits was secondary and supplemental to the criminal provisions. *See id.* at 457 ("Although, under the Enforcement Acts, aggrieved individuals could file suits against their assailants, the major burden of suppressing violence now fell to the federal government."). Section 1983 supposed that the Klan would be suppressed, and that the southern states might then seek to do indirectly what the Klan had done directly, by means of rigged investigations and show trials "under color of state law."

Congress undertook this positive enforcement effort against a backdrop of common-law tort immunities. These included absolute immunity for judges, grand jurors, trial jurors, and witnesses before either the grand jury or the trial jury. Private prosecution of crime, however, remained common and may well have still been the norm in 1871. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth Century United States,* 39 Am. J. Leg. Hist. 43 (1995). Private prosecution was particularly well-entrenched in the South, the focus of Congress in enacting civil rights legislation. As late as 1960, the Supreme Court of Mississippi took "judicial notice of the fact that it has been the custom in this State from time immemorial for individuals interested in the punishment of an accused, such as the husband of the deceased, to employ a special prosecutor in whom they have particular confidence to assist the State's attorney in the prosecution. This practice has been uniformly permissible in this

State." *Goldsby v. State,* 123 So. 2d 429, 437 (Miss. 1960).

The government's brief rightly recognizes malicious prosecution for procuring false accusations at the time Section 1983 was adopted. Brief for the United States at 28-29. The government then connects the historical liability of accusers with the ahistorical absolute immunity rule adopted in *Imbler*. *See Kalina v. Fletcher,* 522 U.S. 118, 132 (1997) (Scalia, J., concurring) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted. (Indeed, as the Court points out. . . there generally was no such thing as the modern public prosecutor.)"). *Imbler*'s turn to absolute immunity reflects policy considerations that supported absolute immunity for judges in 1871. Those policy considerations today are thought to support absolute immunity for prosecutors in their quasi-judicial role, s*ee Kalina,* 522 U.S. at 125 n.11, but only qualified immunity during preliminary investigations, *see Buckley,* 509 U.S. at 269-70; *Kalina,* 522 U.S. at 126 (reaffirming *Buckley*'s functional approach).

Prosecutorial immunity under Section 1983, then, derives from the performance of prosecutorial functions rather than from public office. *See Buckley,* 509 U.S. at 273 ("the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor"). We know of no evidence suggesting a legislative purpose to distinguish between public and private prosecutors. Private prosecutors clearly had no absolute immunity from

malicious prosecution actions; that would have nullified the action altogether. The elements of the action, however, imply qualified immunity for pretrial prosecutorial functions. *See Kalina,* 522 U.S. at 132 (Scalia, J., concurring); *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity,* 2005 B.Y.U. L. Rev. 53, 111 (2005).

**B. Liability Of Prosecutors Under Section 1983 For Constitutional Violations During Investigation May Not Be Nullified By Subsequent Constitutional Violations During The Process Of Formal Adjudication**

These petitioners and the officers with whom they conspired planned in advance to pervert their offices. We do not see that as an inspiring ground of defense. But *see Buckley v. Fitzsimmons,* 20 F.3d 789 (7th Cir. 1994). Respondents have, we believe, two quite sound theories of petitioners' liability for acts that were covered only by qualified immunity under *Buckley.*

First, this Court has held that outrageous misconduct by public officials during investigations may violate the Due Process Clause, whether or not trial follows. When petitioners, prior to the True Information, fabricated and withheld evidence, they knowingly violated the Due Process Clause. They are liable for all damages proximately caused by the violation.

This Court has recognized that trial and conviction are not essential to completed violations of

the Constitution. In *Chavez v. Martinez,* 538 U.S. 760 (2003), a majority of the Court refused to endorse the theory that Fifth Amendment violations depend on use of compelled statements at trial. Justice Kennedy, joined by Justice Stevens and Justice Ginsburg, stated that this theory "strips" the Self-Incrimination Clause "of an essential part of its force and meaning." 538 U.S. at 793 (Kennedy, J., concurring and dissenting). Justice Souter and Justice Breyer concluded, for prudential reasons, that liability for damages was inappropriate when the violation involved no more than questioning a suspect without a *Miranda* warning. *See* 538 U.S. at 778 (Souter, J., concurring). Justice Souter's concurrence recognized a wide range of Fifth Amendment law beyond the "core" prohibition of compelled testimony at trial. *Id.*

Due process prohibits "conduct that shocks the conscience" during criminal investigations. *Rochin v. California,* 342 U.S. 165, 172 (1952). In *Chavez, supra,* five justices—Justice Stevens, Justice Kennedy, Justice Ginsburg, Justice Souter, and Justice Breyer—concluded that the due process claim should go forward on remand. Justice Souter's opinion, joined by Justice Breyer, did not endorse the due process claim as patently meritorious, only colorable. Justice Souter, however, did quote approvingly this language from *Sacramento v. Lewis,* 523 U.S. 833, 849 (1998): "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Chavez,* 538 U.S. at 775 (Souter, J., concurring).

That officers of the court would suborn perjury and conceal evidence as part of a calculated plan to convict the innocent should offend "even hardened sensibilities." *Rochin,* 342 U.S. at 210. *Rochin* involved the violence of a midnight entry without warrant and the infamous stomach-pumping. This case is worse. Here, justice was murdered, by her sworn protectors, with premeditation and deliberation. The violence attending the planned, and resulting, decades of imprisonment makes the stomach-pumping seem a trifle. Respondents therefore allege violations of due process completed at a time when petitioners had only qualified immunity.

Respondents' second theory is equally sound. Even if an unfair trial is essential to a violation, in this case respondents were in fact convicted after a fundamentally unfair trial. We see nothing illogical in holding wrongdoers acting without immunity liable for injuries suffered at the end of a causal sequence that includes acts that are protected by absolute immunity. *See Dennis v. Sparks,* 449 U.S. 29 (1980). If pretrial acts, undertaken with only qualified immunity, lead directly to other acts by the same parties, protected by absolute immunity, that amount to gross violations of constitutional rights at trial, the wrongdoers remain accountable for the consequences of their earlier misconduct. *See Zahrey v. Coffey,* 221 F 3d 342, 353-54 (2d Cir. 2000). The relevant question is not immunity, but proximate cause.

## C. A Return To Scottsboro And Kemper County

We can test petitioners' theory of absolute immunity against respondents' theories of liability by considering hypothetical cases of prosecutorial involvement in the outrageous conduct in *Powell,* and then again in *Brown.*

The first hypothetical case—we will denominate the hypothetical case in quotes rather than italics to make clear that it is indeed a hypo—is "Powell v. Bailey." In the actual Scottsboro case, the women alleged rape to a deputy at the railroad station, whether *sua sponte* or in response to a question is unclear. Suppose we modify the facts of the Scottsboro case by imagining that when Ruby Bates and Victoria Price got off the train in Paint Rock, the county solicitor, H.G. Bailey, has accompanied the deputies. Before Price or Bates has a chance to say anything, Bailey says: "What on earth are two white women doing on a train with nine young black men? They must have raped you, didn't they?" Suppose further that Bates and Price *deny* having any contact, sexual or otherwise, with the arrested blacks. Bailey then says that if Bates and Price don't change their story to accuse the blacks of rape, Bailey will prosecute them for vagrancy. Bates and Price reluctantly agree and tell Bailey that the seven blacks on the car attacked them. Bailey knows that there were nine blacks on the train, and corrects the account. Bailey also knows that a knife was found on one of the arrested men, and instructs Bates and Price to include that in their story.

Our hypothetical concludes when Bailey conducts the direct examination of Price and Bates at the trials. As in the real Scottsboro case, Ozzie Powell is convicted, and despite reversal of the instant conviction the state persists in retrying him with the result that he spends decades in prison. Suppose now that Powell is exonerated, released, and brings an action against Bailey under Section 1983.

As we understand the theory propounded by petitioners and the government, Bailey wins without a trial in our hypothetical case. "All" he has done is invent a false charge and coerce and coach vulnerable witnesses into reading his script into evidence at trial. Either Bailey's immunity for the direct examination at trial relates back to suborning the perjury at the railroad station in Paint Rock, or there is no constitutional violation until trial where absolute immunity protects him.

Our second hypothetical case is "Brown v. Stennis." In our hypothetical case, the district attorney is present during the flogging, advising Deputy Dial and demanding that the prisoners adjust their stories, with a view to the elements of the charge and the rules of evidence. At Brown's trial, as in the real case, the prosecutor offers the confessions into evidence. In our hypothetical, Brown is convicted, and exonerated only after spending decades in prison.

As with the hypothetical case based on the Scottsboro cases, in this hypothetical Brown now sues Stennis under Section 1983. Petitioners and the

government might admit that the hypothetical Stennis has only qualified immunity (and so is liable) for the Fourth Amendment illegal detention and excessive force claims. But the hypothetical Stennis wins, on their theory, on summary judgment on the due process claim. There was no violation until the unfair trial, and at trial the prosecutor has absolute immunity.

Any theory that would insulate pretrial prosecutorial participation in a rerun of *Powell* or *Brown* must be wrong. The notion that a government lawyer could avoid liability under Section 1983 just by shedding the Klansman's sheet, putting on a suit and tie, and moving the lynching into the courthouse flies in the face of the text and history of the statute. The Klan's acts of terror by night were not done "under color of state law." Congress of course adopted criminal provisions to deal with that out-and-out terrorism. Preventing the state from engaging in the same racist violence as the Klan, under color of law, is the very *raison d'etre* of Section 1983.

We think *Buckley* coupled with respondents' due process and proximate cause theories of liability do a much better job with our hypothetical cases. In the hypothetical based on the Scottsboro cases, the prosecutor lacks probable cause for rape although the prisoners are under arrest for assault. Under *Buckley* he therefore has only qualified immunity. He knows that suborning perjury is a crime and that the targets of his abuse are entirely innocent. At the Paint Rock station, then, he violates Powell's due

process right against outrageous investigative misconduct, and he has no qualified immunity defense given his knowledge and motives. At the subsequent trial, we agree that the hypothetical prosecutor has absolute immunity. His acts there, however, are the direct result of his earlier outrageous conduct. The idea that liability is extinguished rather than aggravated by following through on the evil design is absurd and repugnant.

On the hypothetical based on *Brown,* the deputies have only qualified immunity and so are liable for blatantly unconstitutional conduct. Petitioners and the government would discriminate in favor of the prosecutor. We, however, see the hypothetical prosecutor as acting just as the deputies, and so due only qualified immunity under *Buckley.* The notion that the prosecutor's role in presenting the coerced confessions at trial shields their extraction by torture beforehand is repellant.

The complaint in the instant case does not allege a mob of thousands kept out of the trial by troops with machine guns on the roof of the courthouse. We do not think that difference helps petitioners. The officials responsible for the prosecutions in *Powell* and *Brown* were threatened by the outbreak of lynch law; petitioners acted under no such duress. The conspiracy alleged in the complaint constituted a miniature lynch mob, acting methodically by stealth rather than spasmodically by force, under the forms of law. Section 1983 exists to prevent this sort of legalized lynching.

There is a point of distinction from *Brown,* in that the petitioners managed to suborn the witness Hughes without resorting to torture. If petitioners' alleged misconduct is more sanitary than the facts of *Brown,* however, it is a good deal worse than the facts of *Powell.* Price and Bates apparently accused the Scottsboro defendants without prosecutorial prompting.

The obvious difficulty posed by *Imbler* and *Buckley* is where to draw the line between prosecutorial and investigative functions performed before trial by persons holding prosecutorial office. *Buckley* declined to make probable cause a litmus test: "Even after that [probable cause] determination . . . a prosecutor may engage in 'police investigative work' that is entitled only to qualified immunity." 509 U.S. at 274 n.5. For example, although the practice has become uncommon, prosecutors have participated in custodial interrogation. *See, e.g., Stroble v. California,* 343 U.S. 181, 186 (1952). If a police officer and a prosecutor, both seeking a confession for use at trial, take turns beating the prisoner with a rubber hose, it makes no sense to say that the police officer is liable and the prosecutor is not.

The line may need to be drawn case-by-case, but we can suggest a determinate place is to presume absolute immunity after and not before. Under *Kirby v. Illinois,* 406 U.S. 682 (1972) (plurality opinion) and subsequent cases, the Sixth Amendment right to counsel attaches only with the commencement of formal proceedings, by way of indictment,

information, arraignment or preliminary hearing. Justice Stewart stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

*Id.* at 689-90. This is an easy line to draw, because it must be drawn, and has been drawn already in decades of caselaw, for Sixth Amendment purposes. It is also a functional line, for as the Sixth Amendment cases hold, the formal adjudicatory process, in which the distinctive skill-set of the lawyer is required, has not begun. If the suspect has no need for professional legal advice at this stage, we see no general reason for the absolute prosecutorial immunity appropriate to the formal process. The right to counsel, moreover, is offense-specific, *Texas v. Cobb,* 532 U.S. 162 (2001), and so neatly resolves the issue that might arise on a probable-cause reading of *Buckley* when a prosecutor is alleged to have fabricated evidence of Charge X against a suspect arrested, with probable cause, for wholly unrelated Charge Y.

**D. Qualified, Rather Than Absolute, Immunity For Prosecutors During Pretrial Investigations Would Not Inhibit The Vigorous Pursuit Of Legitimate Law Enforcement**

The Justice Department's picture of government lawyers quaking in their wingtips lest the pursuit of criminals subject them to damages is demonstrably false. In the first place, the apparently universal practice is for employing entities to undertake to defend and indemnify law enforcement officials, whether by custom, contract, or, as in this case, statute. *See* Ia. Code, Title XV, § 670.80. *See generally* John C. Jeffries, Jr., *Disaggregating Constitutional Torts,* 110 Yale L. J. 259, 267 (2000). If there are outlying jurisdictions that leave their prosecutors to go it alone, those jurisdictions can, by contract, custom or statute, now undertake to defend and indemnify.

Whatever disincentives to legitimate law enforcement liability may create, then, operate indirectly, on public officials in charge of the employing entity that would be obliged to pay up when prosecutors are called to account. These same employers, of course, face political incentives to take vigorous action against crime. Those pressures can foster miscarriages of justice. *See* Section I, *supra.* Given those powerful political incentives, we think some mild pressure in the direction of sober second thoughts makes sense, whether the officials engaged in pretrial investigation wear police blue or the legal profession's business attire.

Currently the police have only qualified immunity under such cases as *Malley v. Briggs*, 475 U.S. 335 (1986). If qualified immunity provides insufficient protection for vigorous law enforcement, we would expect evidence that the police are acting with less energy than is desirable. This suggestion would doubtless be received with some offense by the families of officers who have lost their lives in the line of duty (32 to gunfire this year so far, *see* The Officer Down Memorial Page, *available online at* http://www.odmp.org/year.php (last visited Sept. 5, 2009)), and by the tens of thousands of police forcibly resisted in the line of duty every year. *See* Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2005* (2006), *available online at* www.fbi.gov/ucr/killed/2005/pressrelease.htm (last visited Sept. 5, 2009) (57,546 officers assaulted in previous year; guns involved in 3.7% of these cases).

It might also be received with skepticism by the tens of thousands of citizens who file complaints against the police for excessive force. *See* U.S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics, table 1.0004.2002, *available online at* www.albany.edu/sourcebook/pdf/t100042002.pdf (last visited Sept. 5, 2009) (in 2002, 26,556 citizens filed complaints of excessive force against officers employed by large departments). The hundreds of thousands of New Yorkers detained under *Terry* without grounds for a subsequent arrest or citation might likewise be surprised to learn that the specter of tort damages has sapped the will of officers on patrol. *See* Greg Ridgeway, Analysis of Racial Disparities in the New York Police Department's

Stop, Question, and Frisk Practices xi, xv (2008) (in sample of more than 500,000 recorded *Terry* stops, 90% resulted in neither arrest nor citation). The social scientists who conducted a careful observation study of 115 police-citizen encounters, which drew all doubtful inferences in favor of the police, and found 30% of the incidents to violate the Fourth Amendment, would likewise be quizzical. *See* Jon Gould & Stephen Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub. Pol'y 315 (2004).

This is not to say that civil liability has no effect on official behavior. The employing entity trains and disciplines its employees and accounts for liability risks in the process. When police action is flagrantly illegal and inflicts injuries meriting substantial damages, as with unnecessary police shootings, the government employers frequently agree to pay significant settlements. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims,* 52 Buff. L. Rev. 757 (2004). Police training and discipline translate this liability risk into more careful behavior. A study of the effects of *Tennessee v. Garner,* 471 U.S. 1 (1985), for example, found that the decision induced a sixteen percent reduction in police homicides nationwide, and that this effect was substantially more pronounced in jurisdictions that had permitted deadly force to apprehend any fleeing felon prior to *Garner*. *See* Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force,* 85 J. Crim. Law & Criminology 241, 256 (1994).

The need for some disincentive to gross prosecutorial misconduct is conceded by the formal applicability of professional and criminal sanctions, despite the withdrawal of the tort remedy. We think these sanctions are draconian in theory and illusory in practice:

> Since 1963, at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct. A study by Ken Armstrong, the legal affairs writer for the Chicago Tribune, found that not one of the prosecutors who broke the law in these most serious charges was ever convicted or disbarred. Most of the time, they were not even disciplined.

Jim Dwyer, Peter Neufeld, & Barry Scheck, Actual Innocence 175 (2000), citing Chicago Tribune, January 8, 1999-January 12, 1999, "Trial and Error" series by Ken Armstrong and Maurice Possley.

Criminal prosecutions and bar proceedings have an additional failing. They do nothing to compensate the victims of prosecutorial abuse for their injuries. *See Carey v. Piphus,* 435 U.S. 247, 254 (1978) ("Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument."). Even if indemnification completely nullified any deterrent incentives under a regime of qualified immunity, such a regime would at

least relieve wholly innocent victims from some of the losses inflicted by malicious misconduct.

**E. A Qualified Immunity Standard For Prosecutors During Pretrial Investigations Would Not Invite A Flood Of Frivolous Suits**

We do not believe that prosecutors will become inundated by frivolous claims. In the first place, we note that litigation takes time and money. A few crackpots may have a taste for suing public officials, but the typical *pro se* complaint can be dismissed on the pleadings. Indeed, the heightened pleading requirements demanded by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and applicable in constitutional tort cases, *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), have apparently fostered a surge of Rule 12(b)(6) motions in civil rights cases. *See* Ettie Ward, *The After-Shocks of* Twombly: *Will We "Notice" Pleading Changes?,* 82 St. John's L. Rev. 893, 915 (2008).

If petitioners are correct that ethical and criminal sanctions adequately restrain prosecutorial misconduct, plaintiffs' lawyers, to whom those same rules apply, provide an important filter against frivolous suits. Pressing a false claim against a prosecutor could not be done without perjury, by the client if not by counsel, and the prospect of a perjury prosecution for lying in a case against a prosecuting attorney seem vastly greater than in ordinary cases.

Coupled with *Iqbal,* Federal Rule of Civil Procedure 11 adds an additional safeguard against

frivolous claims. Rule 11 was strengthened by amendments in 1983—seven years after *Imbler*. The 1983 amendments were widely thought to chill colorable but novel civil rights actions, as well as frivolous suits. *See* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments,* 37 Val. U. L. Rev. 1, 11 (2002). Further amendment to the Rule, in 1993, made the imposition of sanctions less likely, but the Rule still serves as a substantial deterrent. *See generally id.* This history suggests that whatever risk of frivolous lawsuits a qualified immunity standard might run, the Advisory Committee and Congress have the capacity to respond to frivolous litigation with effective deterrents more discriminating than the blunt instrument of absolute liability. *Cf.* The Prisoner Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

Qualified immunity has not induced a torrent of false claims against the police. Yet frivolous suits against police officers are much more likely than frivolous suits against prosecutors. There were more than fourteen million arrests in 2007. *See* Sourcebook of Criminal Justice Statistics, *supra*, table 4.1.2007. Each of these arrests is subject to suit under the qualified immunity rule of *Malley v. Briggs*. There are many more *Terry* stops, also subject only to qualified immunity.

By contrast, in 2004 there were just over a million felony convictions, all together, in the state courts. *Id.,* table 5.44.2004. Ninety-five percent of these were entered on pleas, rather than after trials. *Id.,* table 5.46.2004. Under *Buckley*'s functional test, much prosecutorial conduct is still covered by the absolute immunity standard. The volume of cases in which prosecutors play a significant enough role in pretrial investigation to be subject to even frivolous allegations under a qualified immunity standard is much smaller than the number of cases in which the police are vulnerable to suit.

## III. Prosecutors Should Not Be Held To A Lower Standard Than Uniformed Officers

As we have seen, dozens of officers are slain, and tens of thousands assaulted, every year. They make millions of arrests and millions more *Terry* stops. They must make life-and-death decisions, on the spot, in less time than it takes to read this paragraph. Yet police officers enjoy only qualified immunity, a standard that, we explain above, has influenced police behavior without undermining police effectiveness.

Prosecutors hold both undergraduate and law degrees. They have passed the bar exam and are officers of the courts. Most have some experience and at least some professional training and supervision. It seems fair to suppose, given their professional knowledge, that in the great majority of cases of prosecutorial misconduct, the offending prosecutor

subjectively knows the conduct is illegal. The same may not always be true of police officers. Most are high-school graduates but only a quarter have college degrees. *See* Hazel Glen Beh, *Municipal Liability for Failure to Investigate Complaints Against Police,* 25 Ford. Urb. L. J. 209, 214 n.19 (1998). Despite advances in police training about the relevant constitutional law, it seems highly improbable that police knowledge of legal requirements equals that of prosecutors.

These differences very strongly imply holding prosecutors to at least the same standard as police. From the standpoint of behavioral incentives, prosecutors are more likely to know with confidence whether a prospective action is legal or illegal. They will know the indemnity arrangement they have with their employer. They will also know that even the qualified immunity standard protects them against reasonable mistakes. When they have doubts, about either the law or the facts, they have the luxury of at least some time to enquire before decision, a luxury police officers do not enjoy.

A qualified immunity standard therefore strikes a better balance between over-deterring and under-deterring prosecutorial misconduct during preliminary investigation than is struck by the same standard with respect to the police. Given the pressure of events and the limited training even good departments can provide, accidental but clear police departures from legal standards are regrettable but inevitable. Given the time for decision and the sophistication of the decision-makers, a clear

departure from legal standards by prosecutors is very likely to be malicious. Prosecutorial sophistication suggests that malicious violations can be targeted without discouraging aggressive but legal law enforcement.

From the standpoint of fairness, we are troubled by the prospect that after the law enforcement team is shown to have crossed the line into illegality, the white-collar prosecutors with better reason to know the line will be seen to walk away, while the blue-collar police with less reason to know the line will be held to answer. As things stand, the liability of a police officer who resorts to violence in a dangerous emergency depends on how a jury evaluates the reasonableness of the officer's response long after the fact. Yet a prosecutor who carefully plans a course of perjury and obstruction answers to no one, except other prosecutors. We think an observation Churchill attributed to Lord Balfour is apposite here: "This is a singularly ill-contrived world, but it is not so ill-contrived as that." Churchill by Himself: The Definitive Collection of Quotations 174 (Richard Langworth ed., 2008).

## CONCLUSION

The briefs for petitioners and for the United States both ignore the central features of this case. From reading them, you would not know that Curtis McGhee and Terry Harrington are black, or that petitioners and those they are alleged to have conspired with were white law enforcement officials investigating the murder of a white man who had

until recently been a police captain. If you term search both briefs for "African-American," "black," and "white," all you will find are references to Justices or cases named "Black" or "White."

Any recognition of how the facts of this case recall egregious abuses from some of legal history's worst pages would have detracted from arid logic-chopping aimed at extending the extraordinary shield of absolute immunity. Yet facts, as John Adams once told a Boston jury, are stubborn things. We think the court below was right to hold prosecutors, like police, accountable, albeit subject to a defense of qualified immunity, for the consequences of the alleged gross misconduct. Those consequences include the respondents' quarter century in prison for a crime that no evidence untainted by plausible allegations of official misconduct suggests they committed. Accordingly, we ask this Court to affirm the judgment of the Court of Appeals.

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